IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8961 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHIKHUBHAI C SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 8961 of 1994

MR AJ PATEL for Petitioner No. 1-5

MR HASIT DAVE, A.G.P for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 20/10/2004

ORAL JUDGEMENT

1. The petitioners have filed this petition under Article 227 of the Constitution of India seeking

direction from this Court to issue writ of certiorari by quashing and setting aside the orders dated 03.10.1985 passed by the Mamlatdar and Agricultural Land Tribunal, Gandhinagar in Tenancy Case No. 4758/1985 as well as the order passed by the Gujarat Revenue Tribunal in Revision Application No. TEN.B.A.246/1988 on 22.04.1994.

2. The issues, which are raised by the petitioners in the present petition for consideration of this Court are:

(1) Whether the land in question can be said to be a fragment within the meaning of the said term defined under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, in the context of the fact that it was an irrigated land?

(2) Whether the tenancy of the petitioners can be negatived in the context of the fact that the land was irrigated land?

(3) Whether the tenancy of the petitioners can be negatived on the ground that petitioners nos. 1 to 4 were not agriculturists and, therefore, no tenancy could have been created in their favour in the year 1977?

3. It is the case of the petitioners that petitioners nos. 1 to 4 were cultivating land bearing Survey No. 219/3, admeasuring 1 Acre and 1 Guntha situated in the sim of village Kudasan, Taluka and District Gandhinagar as tenants of petitioner no. 5. The petitioners were cultivating the said land since 1977. The petitioners, therefore, made an application under Section 70(b) read with Section 32-O of the Bombay Tenancy and Agricultural Lands Act, 1948 before the Mamlatdar and the Agriculture Land Tribunal, Gandhinagar for fixation of purchase price of the said land and for a declaration that petitioners nos. 1 to 4 were tenants of the said land.

4. It is also the case of the petitioners that the said application was numbered as Tenancy Case No. 4758/1985 and the Mamlatdar and the Agricultural Land Tribunal, Gandhinagar, after holding an enquiry, held that the concerned petitioners were not agriculturists and, therefore, they were not entitled to purchase the land from petitioner no. 5 and the land in dispute was a fragment and, therefore, petitioner no. 5 could not have sold the said land to the said petitioners. The

Mamlatdar and the Agricultural Land Tribunal, therefore, by an order dated 03.10.1985, rejected the said application of the petitioners.

5. Being aggrieved by the said order of the Mamlatdar and the Agricultural Land Tribunal, the petitioners preferred Tenancy Appeal No. 99/1985 before the Prant Officer, Gandhinagar. The Prant Officer, Gandhinagar, after examining the relevant provisions of the Tenancy Act and the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, held that the land in dispute was an irrigated land, and, therefore, it was not a fragment, and that the concerned petitioners were agriculturists and as such were entitled to purchase the said land. The Prant Officer, therefore, by his order dated 24.01.1986, allowed the said appeal and set aside the order of the Mamlatdar & ALT, and held that petitioners nos. 1 to 4 were tenants of the land in dispute since 21.04.1977. The Prant Officer, therefore, remanded the matter to the Mamlatdar and the Agricultural Land Tribunal, Gandhinagar only for the limited purpose of deciding the purchase price of the land.

6. The respondent-State, however, being aggrieved by the said order of the Prant Officer, preferred Revision Application No. TEN.B.A. 246 of 1988 before the Gujarat Revenue Tribunal. The Gujarat Revenue Tribunal, vide its order and judgement dated 22.04.1994, allowed the revision application, setting aside the order passed by the Prant Officer and restored the order passed by the Mamlatdar and the Agricultural Land Tribunal.

7. It is this order of the Tribunal, which is under challenge, in the present petition.

8. Mr. A.J. Patel, the learned advocate appearing for the petitioners has submitted that the Gujarat Revenue Tribunal has not properly considered the aspect regarding limitation as, admittedly, the Prant Officer has decided the appeal on 24.01.1986, whereas the Revision Application before the Tribunal was filed in 1988. He has further submitted that even the State Government has no locus standi in filing the said revision before the Gujarat Revenue Tribunal. As far as merits of the matter is concerned, Mr. A.J. Patel has submitted that the Prant Officer has, at length, discussed the issue regarding tenancy. The Prant Officer has considered the relevant documentary evidence as well as the oral evidence produced before him. It was also held by the Prant Officer that on the basis of the agreement dated 24.01.1977, petitioners nos. 1 to 4 had

become tenants of the disputed land. The Prant Officer also considered the relevant receipt of the rent issued by the landlord in favour of the tenants. Not only that, the Prant Officer had also considered the statement of the landlord as well as other witnesses wherein it was accepted that the land was given to the petitioners for irrigation. An evidence has also been given to the effect that the land in question was an irrigated land. The Prant Officer has also considered the statements of the Talati as well as other witnesses wherein it was reflected that the land in question was an irrigated land and it was not a fragment land. As far as the earlier proceedings, which were recorded by the Mamlatdar and the Agricultural Land Tribunal, is concerned, the Prant Officer has observed that those documents were not brought on record and it was observed that it was in respect of the proceedings under Section 84(c) of the Act. After considering the entire evidence at length, the Prant Officer has set aside the order of the Mamlatdar.

9. Mr A.J. Patel has further submitted that the Tribunal has not reversed the finding of the Prant Officer so far as tenancy is concerned. On the contrary, in paragraph 7 of the Tribunal's order, it was specifically mentioned that the observations made by this Court in the case of NAVNITLAL GORDHANDAS Vs KESHAVLAL MAGANLAL SUTAR AND ANR, 5 G.L.R., 315 are fully applicable to the facts of the present case and tenants nos. 1 to 4, who are the present petitioners, are covered under Section 2(8) and 2(18) of the Act. The Tribunal has further observed that bar of Section 63 did not come in their way and hence while negativing the arguments canvassed by the respondent-State, the Tribunal has endorsed the observation made by the Prant Officer in his judgement. Mr. A.J. Patel has further submitted that the Tribunal has committed an error while considering the aspect of fragmentation of land. He has submitted that the Tribunal has commented upon the observation made by the Prant Officer so far as fragmentation aspect is concerned. However, the said comment is equally applicable to the Tribunal. It is a settled position in law that an Officer of the Revenue Department may be occupying different capacities under different enactments. That, however, would not empower him to exercise any power under one enactment while proceeding under another enactment. In this connection he has relied on the decision of this Court in the case of EVERGREEN APARTMENT CO-OP HOUSING SOCIETY Vs. SPECIAL SECRETARY, REVENUE DEPARTMENT, GUJARAT STATE, 1991 (1) GLR 113 wherein it is held as under:

"It is quite possible that an Officer of the Revenue Department may be occupying different capacities under different enactments. That, however, would not empower him to exercise any power under one enactment while proceeding under another enactment. So far as the proceedings under Rule 108 of the Rules, popularly known as RTS proceedings, are concerned, it is well settled that the entries made in the revenue records have primarily a fiscal value and they do not create any title. Such mutations have to follow either the documents of title or the orders passed by competent authorities under special enactments. Independently, the Revenue Authorities, as mentioned in Rule 108 of the Rules, cannot pass orders of cancelling the entries on an assumption that the transaction recorded in the entry are against the provisions of a particular enactment. Whether the transaction is valid or not has to be examined by the competent authority under the particular enactment by following the procedure prescribed therein and by giving an opportunity of hearing to the concerned parties likely to be affected by any order that may be passed. Thus on this second ground also the orders of the Collector and the Additional Chief secretary appear to be beyond their jurisdiction. The Additional Chief Secretary has held that the sale by auction was not consistent with the provisions of Section 27 of the Urban Land (Celing and Regulation) Act. Section 27 relates to prohibition of transfer of urban land with a building thereon. Apart from legal position that Section 27 has been struck down as ultra vires, it is quite obvious that no such question of transferring urban land with building thereon has even arisen in the present case. Thus, the order of the revisional authority has proceeded on a misconception of relevant legal provision."

10. The view taken by this Court in EVERGREEN APARTMENT CO-OP HOUSING SOCIETY Vs. SPECIAL SECRETARY, REVENUE DEPARTMENT, GUJARAT STATE is followed in the case of SIDDHARTHBHAI B. SHAH & ORS Vs. STATE OF GUJARAT & ORS, 1999 (3) 40(3) GLR 2537.

11. On the basis of the aforestated judgements, Mr A.J. Patel has submitted that since the finding that the

tenancy is in favour of the petitioners and it has not been disturbed by the Tribunal and since the finding with regard to fragmentation of the land is de hors the proceedings, the Tribunal is not justified in reversing the order of the Deputy Collector. He has therefore submitted that the order of the Tribunal is required to be quashed and set aside and the present petition is required to be allowed.

12. Mr. Hasit Dave, learned Assistant Government Pleader appearing for the respondent-State has submitted that the Mamlatdar and the Agriculture Land Tribunal has at length discussed the earlier proceedings with regard to the same subject matter of the land in question. Those proceedings have become final up to the Gujarat Revenue Tribunal and it was held that the land being fragment land, the same cannot be given by way of lease. For this purpose he has drawn the attention of the Court to the provisions contained in Section 7(2) of the Bombay Prevention of Fragmentation Act, 1947, which states that notwithstanding anything contained in any law for the time being in force or in any instrument or agreement, no such fragment shall be leased to any person other than a person cultivating any land, which is contiguous to the fragment.

13. He has further submitted that the Deputy Collector while reversing the order of the Mamlatdar and the Agriculture Land Tribunal has completely ignored this aspect of the matter and allowed the appeal of the present petitioners. However, while discussing this issue, the Tribunal has given specific finding to the effect that the petitioners could not have become tenants. The Tribunal has further observed that the finding given by the Deputy Collector that the suit land was not fragment was absolutely an incorrect finding and based on such incorrect finding, the Deputy Collector has come to a conclusion that the petitioners have had tenancy right on the suit land, which was a fragment. He has therefore submitted that the finding arrived at by the Mamlatdar and the Agricultural Land Tribunal as well as the Gujarat Revenue Tribunal are just and proper and the same should not be interfered with while exercising the extraordinary writ jurisdiction under Section 227 of the Constitution of India.

14. After having heard learned advocate Mr Patel appearing for the petitioner and Mr. Hasit Dave, the learned Assistant Government Pleader appearing for the respondent-State and after having gone through the orders passed by the authorities below, the Court is of the view

that the Revenue Tribunal has exceeded its limit in considering the aspect of fragmentation. Once the Tribunal has come to a conclusion that the petitioners are tenants within the meaning of Section 2(8) and 2(18) of the Act and once the Tribunal has also come to a conclusion that bar of Section 63 of the Tenancy Act has not been applied to the facts of the present case, it is not open for the Tribunal to discuss any further issue with regard to fragmentation of the land in view of the decisions of this Court in the case of EVERGREEN APARTMENT CO-OP HOUSING SOCIETY and SIDDHARTHBHAI B. SHAH & ORS (Supra). The Deputy Collector had considered the documentary evidence as well as the oral evidence and came to a conclusion that the land was an irrigated land and agreement dated 21.04.1977 was not doubted or disputed and the validity of the said agreement has not been challenged at any point of time before any authority. It appears that by virtue of the said agreement, the petitioners have become tenants. Even with regard to the contention raised by Mr. Hasit Dave that the land becomes fragment and the same cannot be leased out as per the provisions contained in Section 7(2) of the Fragmentation Act, the said contention has no force as no notice has been issued before mutating the entry with regard to the fragmentation Act and in this connection reliance is placed by Mr. Patel on the decision of this Court in the case of HARIJAN PARBHUBHAI MAKANBHAI Vs JOINT SPECIAL SECRETARY REVENUE DEPARTMENT AND ORS, 1994 (1) GCD 794. The Tribunal is therefore not justified as there is nothing on record to show that any notice contemplated under Sub Section 2 of Section 6 was given, much less any entry pertaining to such notice is made in the register of mutation under Section 135 (D) of the Code. Thus, in absence of any proof of notice or an entry having been made under Sub Section 2 of Section 6 of the Act, there is no question of any presumption to be drawn for the correctness thereof.

15. In the above view of the matter, this Court is of the view that the Tribunal has committed an error in interfering with the order passed by the Deputy Collector and since the petitioners are tenants within the meaning of Section 2(8) of the Act, there was no justification to arrive at a different conclusion. The order of the Tribunal is, therefore, quashed and set aside and the order of the Deputy Collector is restored. The petition is allowed. Rule is made absolute with no order as to costs.

16. It is needless to say that the Court has to confined its decision only with regard to the tenancy

based on the agreement in question. The issue regarding fragmentation is open and this decision would not come in the way of the authorities to initiate any action on that count.

(K.A. PUJ, J.)

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